JANETTE K. BRIMMER (WSB #41271)
STEPHANIE K. TSOSIE (WSB #49840)
(*Pro Hac Vice Admission)*
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104-1711
(206) 343-7340 | Phone
(206) 343-1526 | Fax
jbrimmer@earthjustice.org
stsosie@earthjustice.org

ALBERT ETTINGER (IL ARDC#3125045)
(*Pro Hac Vice Admission)*
53 W. Jackson, #1664
Chicago, IL 60604
(773) 818-4825 | Phone
ettinger.albert@gmail.com

Attorneys for Plaintiff Upper Missouri Waterkeeper

KATHERINE O'BRIEN (MSB #13587)
Earthjustice
313 East Main Street
Bozeman, MT 59715-6242
(406) 586-9699 | Phone
(406) 586-9695 | Fax
kobrien@earthjustice.org
Local Counsel for Plaintiff Upper Missouri Waterkeeper

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
GREAT FALLS DIVISION

UPPER MISSOURI WATERKEEPER,	)	No. 4:16-cv-00052-BMM
	)	
Plaintiff,	)	MEMORANDUM IN SUPPORT
	)	OF PLAINTIFF'S MOTION FOR
v.	)	SUMMARY JUDGMENT
	)	

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and GINA McCARTHY, Administrator, United States Environmental Protection Agency,

Defendants,

and

STATE OF MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, TREASURE STATE RESOURCES ASSOCIATION OF MONTANA, MONTANA LEAGUE OF CITIES AND TOWNS, and NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES,

Intervenor-Defendants.

TABLE OF CONTENTS

INTRODUCTION 1

LEGAL FRAMEWORK AND FACTUAL BACKGROUND 2

I. WATER QUALITY STANDARDS FRAMEWORK. 2

II. NUTRIENT POLLUTANTS. 4

III. MONTANA NUTRIENT WATER QUALITY STANDARDS DEVELOPMENT. 5

A. DEQ's Final Submission to EPA in Circulars 12-A and 12-B for Nutrients. 5

B. The Development of Circulars 12-A and 12-B. 8

IV. EPA APPROVAL 12

JURISDICTION 14

STANDARD OF REVIEW 15

ARGUMENT 16

I. THE WATER QUALITY STANDARDS APPROVED BY EPA FAIL TO CONFORM TO THE PLAIN REQUIREMENTS OF THE CLEAN WATER ACT 16

A. The Clean Water Act Requires Water Quality Standards to be Comprised of Criteria Necessary to Protect Designated Uses and to Serve the Purposes of the Act 16

B. EPA Improperly Approved a Water Quality Standard for Nutrient Pollution That is Based on What is Considered Affordable. 22

C. EPA Cannot Subvert the Requirements of the Clean Water Act Through Application of a Policy or Rule 24

II. EPA'S APPROVAL OF THE WATER QUALITY STANDARD GENERAL VARIANCE IS ARBITRARY AND CAPRICIOUS, AS IT IS WHOLLY AND DIRECTLY CONTRARY TO THE EVIDENCE IN THE RECORD 27

III. EVEN IF SOME GENERAL VARIANCE COULD BE ADOPTED EXEMPTING CLASSES OF DISCHARGERS FROM COMPLIANCE WITH THE CRITERIA, CIRCULAR 12-B IS UNLAWFUL UNDER THE ACT AND EPA REGULATIONS 30

A. The General Variance is a Vast Loophole From the Obligation to Take Substantial Action to Protect Waters From Nutrient Pollution 31

B. The General Variance Violates The Clean Water Act and is Directly Contrary to EPA's Own Interpretation of the Act Both Before and After EPA's Approval of the DEQ General Variance 33

1. EPA could not properly approve the general variance because it allows a variance even where the numeric nutrient criteria are attainable 33

2. EPA could not approve Circular 12-B because the general variance does not protect the highest attainable condition 35

3. The record contains no support for EPA's failure to protect the "highest attainable condition" 38

CONCLUSION 41

TABLE OF AUTHORITIES

Page(s)

Cases

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986)....16

Celotex Corp. v. Catrett,
477 U.S. 317 (1986)....16

Chevron USA, Inc. v. Natural Res. Def. Council, Inc.,
467 U.S. 837 (1984)....15

Christopher v. SmithKline Beecham Corp.,
132 S. Ct. 2156 (2012)....15

Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.,
698 F.3d 1101 (9th Cir. 2012)....15

Entergy Corp. v. Riverkeeper, Inc.,
556 U.S. 208 (2009)....20

Fla. Pub. Interest Research Group Citizen Lobby, Inc. v. U.S. EPA,
386 F.3d 1070 (11th Cir. 2004)....3

Forest Serv. Emp's for Envtl Ethics v. U.S. Forest Service,
726 F.Supp.2d 1195 (D. Mont. 2010)....16

Idaho Mining Assoc. v. Browner,
90 F.Supp.2d 1078 (D. Id. 2000)....34

Kan. Natural Res. Council, Inc. v. Whitman,
255 F.Supp.2d 1208 (D. Kan. 2003)....34

Ky. Waterways Alliance v. Johnson,
540 F.3d 466 (6th Cir. 2008)....35

Michigan v. EPA,
__ U.S. __, 135 S.Ct. 2699 (2015)....20, 21

Miss. Comm'n on Natural Res. v. Costle,
625 F.2d 1269 (5th Cir. 1980)....2, 18, 24

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983).....15, 16

Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.,
477 F.3d 668 (9th Cir. 2007).....16

Occidental Eng'g Co. v. I.N.S.,
753 F.2d 766 (9th Cir. 1985).....16

Pac. Coast Fed'n of Fishermen's Ass'ns, Inc. v. Nat'l Marine Fisheries Serv.,
265 F.3d 1028 (9th Cir. 2001).....15

United States v. Doe,
701 F.2d 819 (9th Cir. 1983).....25

United States v. Maes,
546 F.3d 1066 (9th Cir. 2008).....25

Upper Blackstone Water Pollution Abatement Dist. v. U.S. EPA,
690 F.3d 9 (1st Cir. 2012).....32

Waterkeeper Alliance, Inc. v. U.S. EPA,
399 F.3d 486 (2d Cir. 2005).....15, 16

Whitman v. American Trucking Ass'ns,
531 U.S. 457 (2001).....19

Statutes-Federal

5 U.S.C. §§ 701-706.....14

5 U.S.C. § 706(2)(A).....15

28 U.S.C. § 1331.....14

33 U.S.C. § 1251(a).....17, 33

33 U.S.C. § 1251(a)(1).....1, 17

33 U.S.C. § 1251(a)(2).....1, 17, 18, 30, 33, 36

33 U.S.C. §§ 1311(b)(1)(c).....3

33 U.S.C. § 1313 .... 1, 36

33 U.S.C. § 1313(a) 17

33 U.S.C. § 1313(b)(2) 17

33 U.S.C. § 1313(c) .... *passim*

33 U.S.C. § 1313(c)(2)(A) 2, 3, 17, 21

33 U.S.C. § 1313(c)(2)(3) 3

33 U.S.C. § 1313(c)(4) 3

33 U.S.C. § 1314(a) 18

33 U.S.C. § 1314(b) 18

33 U.S.C. § 1342(a)(1) 3

33 U.S.C. § 1342(p)(3)(B) 18

42 U.S.C. § 7409 18

42 U.S.C. § 7412(n)(1)(A) 21

Statutes-State

Mont. Code Ann. § 75-5-103(2) 5

Mont. Code Ann. § 75-5-313 13

Mont. Code Ann. §75-5-313(5)(b) 6, 31

Other Authorities

40 C.F.R. § 122.44(d) 3

40 C.F.R. § 131.2 2

40 C.F.R. § 131.10 33

40 C.F.R. § 131.10(g) 24, 25, 37

40 C.F.R. § 131.11(a) 36

40 C.F.R. § 131.11(a)(1) 2

40 C.F.R. § 131.14 ....24, 38

65 Fed. Reg. 46167 (July 27, 2000) 4

78 Fed. Reg. 54,517 (Sept. 4, 2013) 38

78 Fed. Reg. 54,517, 54,523 (Sept. 4, 2013) 37

Fed. R. Civ. P. 56(c) 16

ARM § 17.30.619 12

ARM § 17.30.619(2) 24

INTRODUCTION

Over forty years ago, Congress enacted the Clean Water Act with the promise and goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a)(1). En route to that goal and the goal of eliminating all discharges of pollution to waters by 1985, Congress directed as an interim goal that the highest uses of waters such as public health and welfare, fish, shellfish, and recreation, must be protected by 1983 wherever attainable. 33 U.S.C. § 1251(a)(2). The development of water quality standards—standards of cleanliness for all waters and all pollutants—is a primary and foundational requirement of the Clean Water Act for meeting those promises, goals, and obligations. 33 U.S.C. § 1313.

Here, the State of Montana Department of Environmental Quality ("DEQ") adopted, and the Environmental Protection Agency ("EPA") approved with record support, water quality standards for nutrient pollutants that include specific science-based numeric criteria that will protect designated uses in Montana's waters such as public health, fishing, and recreation. But at the same time DEQ, with EPA approval, rendered those science-based standards meaningless by simultaneously approving a replacement "variance" standard based on affordability of waste treatment technology, which the agencies attempted to justify based entirely on improper considerations of cost. The substitute "variance" is a technological performance standard as opposed to an in-water or ambient water quality criteria or standard.

The substitute "variance" standard is contrary to the Clean Water Act requirements for water quality standards and contrary to the entirety of the record. Further, even if the Act allows for a water quality standard based on economics rather than actual water quality, the one adopted by DEQ and approved by EPA violates the Act and well-established EPA regulations and policies. Accordingly, Waterkeeper respectfully requests that the Court reverse and vacate EPA's approval of Circular 12-B.

LEGAL FRAMEWORK AND FACTUAL BACKGROUND

I. WATER QUALITY STANDARDS FRAMEWORK.

Congress directed states to establish water quality standards that "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.2. EPA regulations specify that "[s]uch criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use." 40 C.F.R. § 131.11(a)(1). Because water quality criteria must be set at a level that protects the designated use, economic factors "are irrelevant" and states should not take them into account. *Miss. Comm'n on Natural Res. v. Costle*, 625 F.2d 1269, 1277 (5th Cir. 1980). In short, water quality standards under § 1313 are science-based, ambient standards for protection of water.

While Congress directed states to develop standards, Congress also directed EPA to act in a "backstop" capacity where states submit proposed standards to EPA for review and approval or disapproval. 33 U.S.C. § 1313(c)(2)(A). EPA's review is cabined by the requirements for water quality standards to protect designated uses and to serve the purposes of the Clean Water Act. *Id*., and 1313(c)(2)(3). EPA must conduct a "rigorous examination" of state water quality standards. *Fla. Pub. Interest Research Group Citizen Lobby, Inc. v. U.S. EPA*, 386 F.3d 1070, 1087 (11th Cir. 2004). Upon approval by EPA, a state's standards take effect. If EPA disapproves and a state is unable or unwilling to correct them, EPA is obligated to step in and develop standards that protect designated uses and meet the requirements of the Act. 33 U.S.C. § 1313(c)(4).

Adopting science-based and protective water quality standards is foundational to proper implementation of the Clean Water Act affecting, in particular, the second primary method of restoring and protecting our waters, which is pollutant discharge elimination permits. Congress prohibited all pollutant discharges to water absent a permit, and water quality standards are a primary driver of those permit requirements. 33 U.S.C. §§ 1311(b)(1)(c) and 1342 (a)(1). *See also*, 40 C.F.R. § 122.44(d).

II. NUTRIENT POLLUTANTS.

EPA and the states have long understood that nitrogen and phosphorus pollutants ("nutrients") in lakes, rivers, and streams cause serious water quality problems. Accordingly, in 2000 EPA first directed states to adopt water quality standards to address nutrients. EPA, *Nutrient Criteria Development; Notice of Nutrient Criteria Technical Guidance Manual: Rivers and Streams*, 65 Fed. Reg. 46167 (July 27, 2000). *See also*, Administrative Record 228 *et seq*.[1] Nutrient pollution feeds algal blooms that choke waterways, deplete oxygen for fish and aquatic organisms, and change the balance of ecosystems. AR 241-249. *See also,* AR 11685, powerpoint, and AR 1349. At its worst, nutrient pollution can result in toxic or hazardous algal blooms, which can sicken humans and animals. AR 241-249. Despite directing states to develop standards in 2000, many, like Montana, are just getting to it now.

EPA's nutrient criteria guidance provides a structure, consistent with requirements of the Clean Water Act, for states to develop science-based numeric criteria designed to protect lakes and rivers from algal blooms that deplete oxygen, harm ecosystems, and can sometimes result in production of toxins harmful to human and animal health. AR 228 *et seq*. This structure respects the two components of a water quality standard: the designated uses that are to be

[1] Citations to the Administrative Record are "AR" throughout with the pagination provided in EPA's Index to the Administrative Record, filed December 1, 2016.

protected in the water, and the quality criteria for the target pollutant necessary to ensure those uses are protected.

III. MONTANA NUTRIENT WATER QUALITY STANDARDS DEVELOPMENT.

A. DEQ's Final Submission to EPA in Circulars 12-A and 12-B for Nutrients.

In July 2014, DEQ published water quality standards for nutrients in DEQ Circulars 12-A and 12-B. AR 1218 and 1229, respectively. Based upon a large body of scientific work, including the extensive work and guidance from EPA's nutrient guidance, Circular 12-A sets numeric criteria for phosphorus and nitrogen as specified in Mont. Code Ann. § 75-5-103(2), to protect all designated uses such as health, fishing, and recreation, in most waters of Western Montana. AR 1220-1225 (12-A), 1326, 1346, and 1636. Circular 12-A's numeric nutrient standards include pollutant concentration limits, geographical areas where the standards apply, and the period of application (*i.e.*, season). AR 1220-25. The limits on phosphorus and nitrogen pollutants are tied to Montana's particular ecoregional characteristics, and the resulting water quality criteria call for total in-stream phosphorus concentrations ranging from 25 micrograms per liter ("µg/L") to 150 µg/L and total nitrogen concentrations ranging from 250 µg/L to 1300 µg/L. AR

1222.[2]

Circular 12-B, developed and issued at the same time as, and in conjunction with, Circular 12-A, effectively replaces the science-based in-water numeric standards of quality in 12-A with a much less stringent technological performance standard that DEQ identifies as a "variance" or "variance standard", and which is not tied to protecting designated uses. AR 1229. Rather, it is tied exclusively to the cost of pollutant removal technology and what DEQ and dischargers decided was affordable. AR 1230, 1231 and 851.

The 12-B "variance standard" effectively supplants the science-based numeric criteria in 12-A, because the operation of the variance in 12-B, by its own terms, will allow most pollutant dischargers to avoid complying with the 12-A science-based criteria. AR 1231-32. Circular 12-B states:

> [A] person who meets the end-of-the-pipe treatment requirements provided for in Table 12B-1 may apply for and the Department shall approve a general nutrients standards variance ("general variance"). Mont. Code Ann. §75-5-313(5)(b).

AR 1231. That is the total extent of requirements for obtaining the "variance." The replacement variance standards are not expressed in terms of the desired in-stream conditions, but instead are expressed as an allowable pollutant

[2] Ecoregions are described in EPA's nutrient guidance, AR 228 *et seq.*, and refer to regions of the United States having particular geologic, soil, topographic and/or other natural characteristics that may in turn affect natural water quality and ecosystem characteristics. AR 259.

concentration applicable to the effluent discharged from the end of the pipe, achievable by technological performance of treatment systems. AR 1232. The replacement variance standard accepts end-of-pipe treatment technology performance to allow an average monthly concentration of total nitrogen up to 10,000 µg/L in the effluent from the facility (for dischargers that discharge less than one million gallons per day) and average monthly total phosphorus concentrations up to 1,000 µg/L. *Id.* For facilities that discharge more than one million gallons per day, the technological treatment requirement for monthly discharge allows for total nitrogen in the effluent from the facility of 15,000 µg/L and for total phosphorus of 2,000 µg/L. *Id.* Antiquated lagoon waste systems are not required to meet any new technological requirements or to change their operations because the 12-B standard provides they simply have to "maintain performance."[3]

The cost-driven variance standard in Circular 12-B "may be established [*i.e.*, retained] for a period not to exceed 20 years." AR 1231. While it will be reviewed every three years, as required by 33 U.S.C. § 1313(c), Circular 12-B specifies that the review of the variance standard will assess not only whether there is new information that supports modifying or terminating the variance standard, but DEQ must also consider "the aggregate economic impact to dischargers within a category." AR 1232. In other words, DEQ expressly designed a regulatory framework that disregards an individual discharger's ability to achieve discharge limitations that are consistent with the science- and water quality-based standard in Circular 12-A. DEQ may (but does not appear to be required to) alter the weaker replacement standards in 12-B "[i]f a low-cost technological innovation for lowering nitrogen and phosphorus concentrations in effluent were to become widely available in the near future[.]" *Id*.

---

[3] Comparing the monthly phosphorus discharge allowed for smaller dischargers in the variance standard with the water quality standards in Circular 12-A, shows that the end-of-pipe limits allow end-of-pipe pollutant concentrations at low flows up to 40 times greater than the science-based water quality criteria set for phosphorus in large ecoregions in Circular 12-A. Cf. AR 1232 and AR 1222-24. Total nitrogen allowed end-of-pipe at low flows in the variance/replacement standard are similarly enlarged at up to 25 times the total nitrogen water quality criteria in Circular 12-A (assuming the average is 400 µg/L of total nitrogen). *Id.*

With Circular 12-B issued simultaneously to the science-based water quality numeric criteria, the technological performance "variance" standard effectively supplants the science-based standards, making Circular 12-B's performance-based requirements in the variance standard the applicable nutrient water quality standard for Western Montana.

B. The Development of Circulars 12-A and 12-B.

Early in the standards process, DEQ established a nutrient work group which engaged certain stakeholders to develop the water quality standards and at the same time the cost and performance-based variance standard. The record demonstrates that cost and economic considerations were a central part of promulgating the state water quality standards from the outset. *See, e.g.*, PowerPoint from October 2008 titled "Ongoing Discussion of Affordability Assessment Procedure to Accompany Base Numeric Nutrient Standards," AR 11 and AR 5801-04 (DEQ memorandum regarding "nutrient criteria affordability advisory group, dated September 4, 2008).[4]

The work group met throughout 2009 to 2014, receiving presentations regarding development of the numeric criteria during this period. At the same time, the group frequently engaged in discussion regarding complaints over costs of the proposed numeric criteria and how to develop a standard with those cost considerations addressed. *See,* Work Group Agendas and Meeting Minutes in Administrative Record, *e.g.*, AR 11606, *et seq*., 11835 (where, at AR 11849, EPA states it will not approve criteria derived using economic considerations), 12585 *et seq*., 12594 *et seq*., 14542 ("The demonstration of significant and widespread impacts for the private sector was based on more of a descriptive argument than numerical metrics"), 14731 ([the] "widespread test is more the result of best professional judgment than a quantitative analysis"). The emphasis on costs from the outset is stark. The first meeting in May 2009 explored "variances" as a means to "*off-ramp from the standards* based on affordability." AR 11606 (emphasis added). In response to a work group question, DEQ indicated that it would even consider downgrading designated uses to allow for *even higher* levels of pollutants if, after time, compliance with the standards would not be "practical due to affordability or technology[.]" AR 11610.

---

[4] In fact, cost considerations were on DEQ's agenda as early as 2007. A report, evaluated "[t]he potential economic impacts of the preliminary nutrient criteria on public and private waste water treatment entities." AR 5165. The report examined wastewater treatment plant performance data, and contrary to later concerns and ultimate outcomes in the standards, found "that advance phosphorus treatment is affordable." The report's case studies demonstrated that even smaller communities may be able to afford advanced nutrient removal. AR 5172-73, 5182.

DEQ communications with EPA show the state's predetermination that science-based numeric criteria would be economically unacceptable. Email communications between DEQ and EPA indicate that throughout the process economic results were driving data analysis. *See, e.g.*, Letter from DEQ to EPA, Feb. 16, 2010, where DEQ suggests that absent a particular affordability allowance from EPA, "adoption of numeric nutrient criteria for Montana could be in jeopardy." AR 11829. At some points in the process, state regulators even started making the economic case on behalf of dischargers, discussing how to make an argument that numeric criteria will be economically unacceptable even where private industry could not or refused to provide the financial and business data necessary to establish the need for case-by-case variances. *See*, Email from Jeff Blend to Tina Laidlaw, Nov. 1, 2011, where DEQ stated they "could probably make the widespread [economic adverse impact test] work – especially for private businesses"; AR 13024, and Email from Jeff Blend to Tina Laidlaw, Dec. 27, 2011, "[t]he argument may seem a bit thin, but the pieces we have come up with are convincing in my opinion"; AR 13548. EPA similarly weighed in with recommendations for "'low hanging fruit'…dischargers that I thought may show economic hardship if you had financial data." Email from Tina Laidlaw to Jeff Blend, Oct 25, 2011.[5] AR 13453. A January 21, 2010, DEQ powerpoint presentation further emphasizes that DEQ was not engaged in an exercise to simply set water quality standards to protect uses under the Clean Water Act, but rather was engaged in a side-by-side cost-benefit analysis of whether to adopt protective standards, weighing and discussing the "worth" of clean water and how a dollar figure could be attached to that "value" and how the "costs" of standards outweighed those hard to identify environmental "benefits." AR 6680-6696.

The economic evaluation and justifications for a technology-based performance standard instead of numeric criteria designed to protect in-water quality for designated uses culminated in the development of a Substantial and Widespread Economic Impacts Analysis report, in which DEQ concluded that 95% of the communities in Montana demonstrate substantial and widespread impacts and so economic hardship would be felt on a statewide scale. AR 9109. In the report DEQ found, based mainly on assumptions from a limited sampling of

[5] EPA and DEQ strove to find that setting protective water quality standards were "too costly" even though, by September of 2013, it appears that DEQ had determined a majority of towns could afford to meet protective numeric criteria. AR 17026-27.

dischargers, not on actual financial data from all dischargers, that the science-based numeric nutrient criteria that would protect designated uses would be too costly for the *entire state*. *Id.*

As can be seen from the above examples and throughout the record, both Circulars moved through the process together, and the record makes clear that the 12-B "variance" technological standard had to be the applicable standard or the 12-A numeric nutrient water quality standards were dead. *See e.g.*, AR 11606 and 11829. In fact, DEQ provided a poison pill in rules directing that if EPA did not approve the technological performance standard as a general and state-wide "variance" or if a court declared it invalid, then the science-based numeric criteria would automatically be "void." ARM § 17.30.619.

Waterkeeper objected to the Circular 12-B variance standard as improper under the Clean Water Act and not protective. AR 1066-1084.

DEQ submitted Circulars 12-A and 12-B together for EPA approval on August 15, 2014. AR 2362.

IV. EPA APPROVAL

Early EPA analysis of DEQ's work on the nutrient standard package, in particular on the cost-based variance standard in 12-B, listed concerns about consistency of the rule package with Clean Water Act requirements. EPA's analysis emphasized that EPA policy is "intended to support dischargers in moving toward water quality standards attainment – not to further cause or contribute to their non-attainment" and that it "likely will be a core issue for EPA." AR 9846-47. The analysis also expressed concern that basic assumptions underlying the economic analysis may be difficult to support as more information becomes available. AR 9849. In answering the question of whether a statewide all-discharger general variance can be supported under the Act, the EPA noted "this will likely be a difficult Clean Water Act consistency issue." AR 9852.[6]

Nonetheless, EPA approved the DEQ Circular 12-A numeric nutrient standards *and* 12-B "variance" standard (the technological performance –based standard) in February 2015. AR 826. EPA's approval of the numeric nutrient standard is based, in part, on the conclusion that the provisions "are based on a sound scientific rationale that is consistent with the EPA guidance on deriving [numeric nutrient criteria] using scientifically defensible methods." AR 837. Simultaneously, EPA approved the variance standard that effectively replaces the science-based numeric standard, claiming that applying the actual numeric nutrient criteria to protect water quality would result in "substantial and widespread economic and social impacts for all [publicly owned treatment works] covered by a general variance." AR 850.

[6] EPA's concerns were also evident much earlier in a draft letter to DEQ where it takes issue with Mont. Code Ann. 75-5-313, directing DEQ to grant a general variance without a demonstration by each discharger of how it meets the requirements for a variance. AR 12110.

JURISDICTION

This court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-706.

Plaintiff Upper Missouri Waterkeeper, Inc. ("Waterkeeper") is a non-profit membership organization dedicated exclusively to protecting and improving the ecological and aesthetic qualities of Southwest and West-central Montana's Upper Missouri River Basin. *See*, Affidavit of Guy Alsentzer. Waterkeeper and its members reside on or near, or recreate on, the waters of Montana, including waters affected by nutrient pollution and the water quality standards that are the subject of this case. Waterkeeper's members, such as Mr. Arnold and Ms. Evener, have personal interests in the Missouri River and other rivers of the state of Montana as residents, recreationalists, anglers, and fly fishermen. *See*, Affidavits of Arnold and Evener. Members also own and operate businesses that are dependent on the health and water quality of the Missouri River. *Id.*

EPA's approval of DEQ's standards has an adverse impact on Waterkeeper and its members' ability to use and enjoy water bodies in Montana, and has injured the interests of Waterkeeper and its members. *Id.* Using 12-B, DEQ may allow large amounts of pollution and impairment of designated uses that would not be allowed under proper standards. A decision by this Court reversing the approval of Circular 12-B will redress the adverse impact and injury from EPA's action. *Id.*

STANDARD OF REVIEW

The standard of review applicable to this case is pursuant to the Administrative Procedure Act where the court will set aside agency action that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency acts contrary to the law when it fails to abide by and implement the direction and intent of Congress or when it acts contrary to its own rules and requirements. *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012). "[A]n agency rule [is] arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Pac. Coast Fed'n of Fishermen's Ass'ns, Inc. v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1034 (9th Cir. 2001). *See also, Waterkeeper Alliance, Inc. v. U.S. EPA,* 399 F.3d 486, 498 (2d Cir. 2005).

The agency must explain how it has reached its conclusions, making a rational connection between the facts found and the choice made. *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1124 (9th Cir.

2012); *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 687 (9th Cir. 2007). It is not appropriate for a court to defer to EPA on a matter that it has failed to address or explain. *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43, 50; *Waterkeeper Alliance*, 399 F.3d at 498.

ARGUMENT

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Because this case involves review of final agency action and an administrative record, it does not present any genuine issues of material fact and resolution of the case on summary judgment is appropriate. *Forest Serv. Emp's for Envtl Ethics v. U.S. Forest Service*, 726 F.Supp.2d 1195, 1207 (D. Mont. 2010); *see also Occidental Eng'g Co. v. I.N.S.*, 753 F.2d 766, 770 (9th Cir. 1985).

I. THE WATER QUALITY STANDARDS APPROVED BY EPA FAIL TO CONFORM TO THE PLAIN REQUIREMENTS OF THE CLEAN WATER ACT.

A. The Clean Water Act Requires Water Quality Standards to be Comprised of Criteria Necessary to Protect Designated Uses and to Serve the Purposes of the Act.

In the Federal Water Pollution Control Act of 1972, commonly referred to as the Clean Water Act, Congress stated the Act's purpose and goals to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and that wherever attainable, the *interim goal* would be for water quality sufficient to provide for the protection and propagation of fish, shellfish, and wildlife, as well as recreation in and on the water, by *July 1, 1983*. 33 U.S.C. §1251(a) and (a)(2). This is often referred to as the "fishable-swimmable" goals of the Clean Water Act.[7]

The Act directs states to develop water quality standards sufficient to meet the requirements of the Act, and requires EPA to step in and develop standards where a state is unwilling or unable to do so. 33 U.S.C. § 1313(a). A state's proposed standards and subsequent modifications or additions thereto must be submitted to EPA for review and approval (or disapproval) to ensure compliance with the requirements of the Act. *Id.* § 1313(a) and (b)(2). Congress specified that new and revised water quality standards:

> shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes and also taking into consideration their use and value for navigation.

Id. § 1313(c)(2)(A). The Act does not contemplate or allow for standards to be established based on cost or affordability for dischargers that may be subject to water quality-based discharge limits under the Act.[8] Similarly, where Congress directed EPA to develop and publish water quality criteria that accurately reflect the latest scientific knowledge, Congress directed that those criteria be driven by considerations of health and welfare, including impacts on fish, shellfish, wildlife and ecosystems, but did not provide for or allow considerations of cost or affordability. *Id.* § 1314(a). *See also, id.* § 1314(b). The Fifth Circuit held more than thirty years ago that costs or affordability play no role in the development of water quality criteria under 33 U.S.C. § 1313, finding Congress clear on that point. *Miss. Comm'n on Natural Res. v. Costle*, 625 F.2d at 1277.

---

[7] Congress further set the national goal that all discharges of pollution to navigable waters would be *eliminated by 1985*. 33 U.S.C. §1251(a)(1).

This makes sense in that this part of the Clean Water Act, where Congress is directing the agency and the states to determine what a clean and healthy environment is and to provide standards sufficient to protect that clean and healthy environment, operates like the ambient air standards requirements of the Clean Air Act, 42 U.S.C. § 7409. The Supreme Court has followed this reasoning in addressing issues under the Clean Air Act that are the same or similar to the ones

[8] This is in contrast to other parts of the Clean Water Act where Congress either explicitly directs cost consideration or makes room for it through language, such as "maximum extent practicable" (municipal stormwater permit requirements) § 1342(p)(3)(B) or "best practicable control technology" (specific requirements for particular effluent limit guidelines) §1314(b) or "where attainable" (interim water quality goals pending full elimination of pollutant discharges and full restoration and protection of chemical, physical and biological quality) § 1251(a)(2).

under consideration here, and the results of that consideration are instructive. In *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001), the Supreme Court addressed the question with respect to the development of National Ambient Air Quality Standards ("NAAQS"), the Clean Air Act equivalent of water quality standards. In that case, Justice Scalia relied on the plain language of Clean Air Act directives for the setting of air standards to reject arguments that EPA must consider the cost of imposing a particular standard of air quality. *American Trucking*, 531 U.S. at 465. The Court points out that Congress plainly directed EPA to identify the maximum airborne concentration of a pollutant that the public health can tolerate, adding an adequate margin of safety and that "[n]owhere are the costs of achieving such a standard made part of that initial calculation." *Id.* The Court noted that Congress made plain that the standards are to protect public health and that no other reading was supported or even possible. *Id.* at 466-67. Moreover, the Court is loathe to infer, and will not, that Congress would alter the fundamental details of a regulatory scheme—in that case the goal to protect the nation's air to protect public health—through vague terms or ancillary provisions. *Id.* at 468 (citations omitted).

The Court's decision in *American Trucking* is reinforced by cases where the Court finds consideration of costs is appropriate or even required under very specific provisions of the Clean Air and Clean Water Acts. In each of two examples, a clear distinction emerges. Unlike the provision at issue in *American Trucking*, instances where the Court determines that consideration of cost is appropriate are where Congress explicitly mentions cost or where Congress plainly provides room for cost consideration relative to industry- or polluter-specific requirements or permits. That is, there is a distinction between setting the actual environmental standards necessary to ensuring a clean and healthy environment, and the specifics of implementation for individual polluters or specifically-identified types of industry in permits or specific pollutant limits.

In *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009), the Court addressed a very specific EPA regulation and provision of the Clean Water Act, different from the standards-setting requirements at issue here, and found that EPA regulations specific to technological requirements for avoiding the entrainment of fish in cooling water intake structures at large power plants may take cost into consideration where Congress provided that technological standards should reflect the "best technology available" for minimizing adverse impact. *Entergy*, 556 U.S., at 218-19. The Court found the regulations at issue, which concerned site- and polluter-specific cost benefit analysis for individual technology variances from the general technology standards developed by EPA, to be a reasonable interpretation of the statute. *Id.*

In *Michigan v. EPA*, __ U.S. __, 135 S.Ct. 2699 (2015), the Court addressed a regulation specific to the emissions of hazardous air pollutants by the power plant industry, not standards-setting for protecting the quality of the environment or human health, ultimately disagreeing that EPA was prohibited from considering cost when it was determining whether regulation of a particular industry under 42 U.S.C. § 7412(n)(1)(A) was necessary and appropriate. *Michigan*, 135 S.Ct., at 2709. In reaching this conclusion, the Court contrasted that language to the standard-setting directive to protect public health in *American Trucking*. *Id.*

Again, the case here is a standards-setting case. Congress directed the states and EPA to set standards using science-based criteria, to protect water quality necessary to protect designated uses of the waters in question such as consumption, recreation, and the protection of wildlife and ecosystems. 33 U.S.C. § 1313(c). Nowhere in that direction does Congress explicitly direct that standards for water quality can be compromised based on costs or affordability, nor does Congress implicitly allow consideration of costs in standards-setting with words such as "best available" or "best practicable" or that standards "minimize" pollution or that scientific considerations be discounted or ignored. As with the air quality standards in *American Trucking*, the agency here is constrained to approve only those water quality standards that are science-based, that will protect the public health and welfare, that enhance the quality of the water, and that serve the purposes of the Act set by Congress. 33 U.S.C. § 1313(c)(2)(A).

B. EPA Improperly Approved a Water Quality Standard for Nutrient Pollution That is Based on What is Considered Affordable.

In approving the replacement technology- and cost-based variance standard in Circular 12-B, EPA approved nutrient water quality standards for Montana that are based solely on cost or desired affordability of meeting the standards, are not science-based, do not protect designated uses, do not protect public health and welfare, and do not enhance water quality or serve the purposes of the Clean Water Act. In Circular 12-A, DEQ developed numeric nutrient criteria and a record that fully supports the criteria in keeping with the requirements of the Act. AR 1326 *et seq.*, AR 1346 *et seq.*, AR 1640. The numeric criteria are to protect Montana streams from the negative effects of nutrient pollution—phosphorus and nitrogen—primarily excessive algal growth and the problems that accompany it, such as the production of toxins, depletion of oxygen, and physical growth that interferes with recreation and fish habitat. AR 241-249. This part of the nutrient water quality standards, approved by EPA, is compliant with the Clean Water Act, 33 U.S.C. § 1313(c).

Unfortunately, EPA also approved the Circular 12-B variance standard, which is simply a technology performance standard for pollution treatment at waste facilities that effectively substitutes for the 12-A numeric water quality standard that is dictated and supported by the record. With Circular 12-B, DEQ excuses pollutant dischargers from requirements to meet the numeric water quality standards if they simply comply with the less-stringent technological performance requirements. This wholesale off-ramp for dischargers means that the critical foundational benefit to protecting and restoring water—first by setting standards of quality and then by requiring permits to be structured to meet those standards of quality—is lost.

EPA appears to justify approving the weaker cost-based variance standard in place of the science-based numeric standard, due entirely to general economic considerations and complaints or concerns about affordability of complying with the numeric criteria. EPA's approval and the justification for it is wrong as a violation of the plain requirements of the Clean Water Act. Over the course of years and concurrently with developing the science-based criteria, DEQ worked to provide and justify a general variance for all discharges—public and private—and across waters, repeatedly lobbying EPA on the topic, in order to prevent the science-based nutrient standard from taking effect. AR 11121 (DEQ email to EPA that DEQ is considering variances "as a companion implementation procedure option for the standards"), AR 11829, AR 1547 *et seq.*, AR 1589 *et seq.* DEQ even issued a rule providing that the numeric standard would be "void" if either EPA or a court disapproved of the Circular 12-B cost-based variance standard allowing pollutant dischargers—both public and private—to be excused from meeting water quality based standards in favor of cost-based technological standards. ARM 17.30.619(2). Over and over, the excuse or rationale given for negating the science-based criteria in this fashion was cost or affordability of the science-based criteria. AR 1219, 1239, 851.

Cost or affordability of water quality standards or the criteria necessary to protect designated uses is not an allowable consideration under the plain direction of the Clean Water Act. 33 U.S.C. § 1313(c) and *Miss. Comm'n on Natural Res.*, 625 F.2d at 1277. By approving a technological standard in place of the actual science and record-based numeric water quality criteria, on the basis of cost arguments, EPA has acted contrary to the requirements of the law and contrary to the evidence in the record before EPA. EPA's approval of the variance standard in Circular 12-B should be set aside.

C. EPA Cannot Subvert the Requirements of the Clean Water Act Through Application of a Policy or Rule.

EPA cannot circumvent the requirements for water quality standards by simply characterizing the weaker technological standard (that replaces the science-based water quality standard) as a variance under EPA's policy or rules.[9] What DEQ proposed and EPA approved, was a standard for Montana waters that does

[9] At the time DEQ issued Circular 12-B, EPA did not have a rule to expressly address whether or how to allow variances. EPA guidance at the time provided that it applied 40 C.F.R. § 131.10(g) analysis to variances. EPA Water Quality Standards Handbook, Ch. 5, section 5.3. *See* AR 824-825. Since then, shortly after approving DEQ's rules package, EPA finalized an actual rule for variances at 40 C.F.R. § 131.14.

not comply with § 1313 of the Clean Water Act. Stretching EPA's variance policy to its outer limits to cover that error is simply semantics and a justification designed to fit a desired, unlawful outcome.

An agency cannot circumvent or subvert the plain direction of Congress through rule, either explicitly or in the manner the agency interprets and applies its rule. *United States v. Maes*, 546 F.3d 1066, 1068 (9th Cir. 2008) (a regulation does not trump an otherwise applicable statute); *United States v. Doe*, 701 F.2d 819, 823 (9th Cir. 1983) (when a regulation conflicts with a statute, the statute controls).[10] Here EPA seeks to do just that.[11]

The record supports the science-based numeric nutrient standard in Circular 12-A developed to protect uses. Circular 12-A complies with the Act. Circular 12-B is developed simultaneously as a replacement "variance" standard with very little record support and a thin attempt to comply with EPA policy. AR 13024, 13548. Where EPA policy allowed for variances only when certain requirements were met in specific circumstances, 40 C.F.R. § 131.10(g) and AR 9 and 11-13,

[10] To be clear, Waterkeeper is not here challenging EPA's variance policy and its application of a rule in effect at the time DEQ submitted Circular 12-B, that EPA applied from time to time to approve particular variances from particular water quality standards in particular circumstances. Rather, Waterkeeper challenges EPA's interpretation and application of its policy, contrary to the plain language and directives of the Clean Water Act.

[11] Moreover, as detailed in Part III, *infra*, Circular 12-B does not even comply with EPA's variance policy and rule, even if application of EPA's variance policy and rules were allowed to subvert statutory requirements for water quality standards.

here EPA stretches those requirements to excuse a wholesale replacement of the science-based numeric water quality standard. And while Circular 12-B provides lip service to the variance standard being revisited in three years (as it must under 33 U.S.C. § 1313(c)), AR 1232, the record is also replete with references to the fact that the science-based numeric criteria will not apply to waters in Montana unless and until reverse osmosis treatment technology gets significantly cheaper or some other cheap technology comes into being. AR 1232 and AR 14957 (clarifying meeting with EPA, where "[v]ariances from the adopted standards may continue for dischargers past 20 years depending on [limits of technology] and economic analysis"). The weaker, across-the-board technological standard as a stand-in for water quality standards in Montana, is intended to last for at least 20 years, absent cheap treatment technology. And if, over those 20 years, DEQ has not found in the aggregate for pollutant dischargers that some technology is adequately cost-effective, EPA has suggested it will simply allow DEQ to permanently downgrade protections for the waters by downgrading the uses that must be protected. AR 15001 and AR 15006 ("If after 20 years, affordable technology does not exist to allow compliance, then the variance may be continued, or the standards or the beneficial uses may be changed" and "DEQ's goal with the variance is to buy time to allow technology to improve and get cheaper"). This is not a "variance" under a policy or rule, this is simply a substitute cost, as opposed to science-based water quality standard for Montana waters that EPA approved. EPA cannot bend its variance rule to cover its approval of a standard that does not comply with the law.

EPA cannot approve a water quality standard for Montana waters that is not protective of designated uses, does not protect public health and ecosystems, and simply claim that it can grant a state-wide, all-discharger "variance" and thereby escape the requirements of the Act. EPA does not get to grant itself or DEQ a "variance" from complying with the plain direction of Congress.

II. EPA'S APPROVAL OF THE WATER QUALITY STANDARD GENERAL VARIANCE IS ARBITRARY AND CAPRICIOUS, AS IT IS WHOLLY AND DIRECTLY CONTRARY TO THE EVIDENCE IN THE RECORD.

The record in this case demonstrates that regardless of whether EPA could approve a water quality standard different from the scientifically-supported nutrient criteria, EPA's decision to approve the 12-B variance from the science-based numeric standard of 12-A was not driven nor supported by the facts and record evidence. Rather, the record shows that EPA and DEQ had predetermined the result—a performance standard for all dischargers applicable across waters based on general assertions of affordability. The resulting technology- and cost-based variance standard is not based on the record evidence demonstrating the need for more stringent standards to protect designated uses, but rather on improper economic considerations. EPA's actions are the embodiment of arbitrary and capricious decision-making.

Based upon a large body of scientific work, Circular 12-A sets numeric criteria for phosphorus and nitrogen to protect all designated uses, such as health, fishing, and recreation, in most waters of Western Montana. AR 1220-1225 (12-A), 1326, 1346, and 1636. Circular 12-A's numeric nutrient standards include pollutant concentration limits, geographical areas where the standards apply, and the period of application (*i.e.*, season). AR 1220-25. The limits on phosphorus and nitrogen pollutants are tied to Montana's particular ecoregional characteristics, and the resulting water quality criteria call for total in-stream phosphorus concentrations ranging from 25 micrograms per liter ("µg/L") to 150 µg/L and total nitrogen concentrations ranging from 250 µg/L to 1300 µg/L. AR 1222.

Yet, from the outset, the record reflects that DEQ intended to respond to the requests of pollutant dischargers to ensure that the science-based numeric nutrient criteria and standards would not apply to them, or at least not until any required pollution control was much cheaper than the current cost of reverse osmosis technology (the only treatment technology ever discussed by the state). For example, the first meeting in May 2009, explored "variances" as a means to "*off-ramp from the standards* based on affordability." AR 11606 (emphasis added). Email communications between DEQ and EPA indicate that throughout the process economic results were driving the data analysis. *See, e.g.*, Letters and emails between DEQ and EPA, *supra*, AR 11829, 13024, 13548.

Further, the record shows that the state was not interested in determining case-by-case permitting variances for individual pollutant dischargers after the science-based, protective numeric standards were in place, nor was the state interested in making those determinations in accordance with EPA rules and policies for granting individual permit variances. *See e.g.*, AR 14731 ([the] "widespread test is more the result of best professional judgment than a quantitative analysis"). DEQ repeatedly argued with EPA regarding how to assess affordability for municipalities. AR 11721, 11759, 11829. And when it came to private industry pollutant dischargers, the state, with the aid of EPA, glossed over the evidentiary requirements in deference to industry's reluctance and mostly refusal to provide information necessary to judging whether a permitting variance is appropriate. *Id.* and AR 13453; 1597, 1603-04, 1613

EPA's final agency action in approving the technological performance standard in Circular 12-B as a water quality standard for nutrient pollutants, is not based on the science and record evidence before the agency, but rather driven by improper considerations of cost and affordability designed to justify an across-the-board general variance. As such, EPA's decision deserves no deference and must be reversed as arbitrary and capricious.

III. EVEN IF SOME GENERAL VARIANCE COULD BE ADOPTED EXEMPTING CLASSES OF DISCHARGERS FROM COMPLIANCE WITH THE CRITERIA, CIRCULAR 12-B IS UNLAWFUL UNDER THE ACT AND EPA REGULATIONS.

Even if EPA could, within the requirements of the Act, allow for the use of a general variance based upon cost-driven technological standards, the action approved here is unlawful because it violates some of the most basic premises of the Clean Water Act, and it is not even compliant with EPA's long-time rules and policies for use of variances. Again, the first section of the Act states:

> It is the national goal that wherever attainable, an interim goal of water quality which provides for the protection of and propagation of fish, shellfish and wildlife and provides for recreation in and on the water shall be achieved by July 1, 1983.

33 U.S.C. 1251(a)(2). In violation of this principle, Circular 12-B approved here, allows dischargers a blank check for 20 years to discharge nitrogen and phosphorus at levels that prevent attainment of water quality uses in many circumstances in which those uses could be attained. Circular 12-B is written so broadly that it, first, allows dischargers to obtain variances for which they have not demonstrated a need, and second, allows dischargers that need some relief from the numeric nitrogen and phosphorus standard to qualify for a generous one-size-fits-all variance that allows far more pollution than would be allowed if the variance were tailored as required by long-time EPA policy and practice.

A. The General Variance is a Vast Loophole From the Obligation to Take Substantial Action to Protect Waters From Nutrient Pollution.

The requirements for obtaining a general variance are stated quite simply and clearly in Circular 12-B:

> [A] person who meets the end-of-the-pipe treatment requirements provided for in Table 12B-1 may apply for and the Department shall approve a general nutrients standards variance. Mont. Code Ann. §75-5-313(5)(b).

AR 1231. That is the total extent of requirements for obtaining the "variance." If a discharger meets the effluent requirements of Table 12B-1, the Department "shall approve." Table 12B-1 specifies end of the pipe concentration limits that may not be exceeded on a monthly average basis of 1000 µg/L (1.0 mg/L) total phosphorus and 10,000 µg/L (10.0 mg/L) total nitrogen for a plant discharging more than 1.0 million gallons per day. Smaller plants may not exceed 2,000 µg/L (2.0 mg/L) total phosphorus and 15,000 µg/L (15.0 mg/L). Lagoon systems need only "maintain current performance" to fully qualify for the broad 12-B exemption.

These limits provided in Table 12-B are not protective as demonstrated by the overwhelming science in the record. Obviously, the limit on old lagoon systems will at best maintain the status quo. The limits for nitrogen and phosphorus would allow instream concentrations of these pollutants that are up to 40 times the concentration that has been found to be safe for Montana waters based on the science approved by EPA.[12]

Further, the Circular 12-B end-of-the-pipe treatment requirements for nitrogen and phosphorus are not stringent. They are respectively 200% and 1000% higher than permit effluent limits that have been ordered by EPA to protect Massachusetts water bodies and which have been upheld as justified. *Upper Blackstone Water Pollution Abatement Dist. v. U.S. EPA*, 690 F.3d 9, 24-5 (1st Cir. 2012).

The only obligation for beneficiaries of the general variance, other than the requirement to meet the lax end-of-the-pipe requirements of Table 12-B, is the requirement for a "Wastewater Facility Optimization Study." AR 1233. This optimization study, however, is explicitly designed to require only improvements that can be made without structural changes in the plant or "substantial" investment, making no reference to, or requirement for, moving toward or achieving attainment of the actual science-based nutrient standards.

Finally, Circular 12-B states that the requirements of Table 12-B expire on July 1, 2017, but they "may be extended without modification or modified and extended in a rulemaking proceeding conducted by the Department." AR 1231. Nothing keeps the lax requirements of Table 12-B from being extended for 20

[12] For example, for a discharge in which there is no instream dilution, allowing a discharge with a phosphorus concentration of 1000 μg/L would create conditions in a stream that would be 40 times the safe level of phosphorus for a stream for which the 25 μg/L criteria is applicable (1000/25 = 40).

years or even weakened during the two decades in which the general variance may be in effect. Further, the record plainly reflects an intention that the dispensation from meeting water quality standards will be changed only if some cheap technology comes along. AR 1232, 14957.

B. The General Variance Violates The Clean Water Act and is Directly Contrary to EPA's Own Interpretation of the Act Both Before and After EPA's Approval of the DEQ General Variance.

EPA's approval of the general variance is arbitrary, capricious and in violation of the law because it (i) allows variances when standards are, in fact, attainable by the party getting the variance, and (ii) allows variances that do not protect the highest attainable use.

1. EPA could not properly approve the general variance because it allows a variance even where the numeric nutrient criteria are attainable.

That variances should not be granted to the extent the standards can be met is evident from the language of the Clean Water Act itself, which sets an interim goal that standards be met "wherever attainable."[13] 33 U.S.C. § 1251(a)(2). EPA recognized this in adopting its regulation, 40 C.F.R. § 131.10, allowing designated uses to be removed (or a variance allowed under EPA's policy) *only* if unattainability was demonstrated pursuant to certain very specific criteria and

[13] This provision in the Act references "interim" goals—uses that must be protected on the way to actually restoring natural physical, biological, and chemical conditions in our waters and fully eliminating pollution discharges. 33 U.S.C. § 1251(a).

limitations. *See*, *Kan. Natural Res. Council, Inc. v. Whitman*, 255 F.Supp.2d 1208, 1209 (D. Kan. 2003); *Idaho Mining Assoc. v. Browner*, 90 F.Supp.2d 1078, 1097-98 (D. Id. 2000) (uses are presumed to be attainable absent a demonstration to the contrary). The burden of demonstrating unattainability is unquestionably on the polluter or state seeking to be excused from compliance.

Circular 12-B sets a single technology standard that is much less stringent than what is required to protect designated uses, and declares that all dischargers that meet the technology standard are automatically excused from trying to meet water quality standards, even if they can. In its approval document, EPA implicitly recognized this, but then invented a supposed requirement not present in Circular 12-B or substantiated by anything in the record, to paint over the fatal flaw. The approval document states:

> If at the time of permitting, Montana determines that, based on site-specific facts and details (e.g., dilution, alternatives to discharge, installing less expensive treatment technology) an individual discharger can meet the [numeric nutrient criteria] -based limits, then the discharge permit would include such limits.

AR 850. There is no basis for EPA's claim that limits needed to meet the water quality-based criteria "would" be applied to individual dischargers capable of meeting them. There is no Montana statute or rule that overrides or puts qualifications on Circular 12-B's blanket variance from the science-based standards, and EPA cites to nothing in the record that supports its statement that the DEQ variance is more selective and site-specific than it appears on its face. Waterkeeper has found nothing in the record that supports any notion that the DEQ variance is at all selective or site- or discharge-specific. EPA cannot evade the Clean Water Act, 33 U.S.C. § 1313(c), by relying on unsupported hopes or unenforceable state assurances to justify approving a standard that does not provide what EPA wishes it provided. *Ky. Waterways Alliance v. Johnson*, 540 F.3d 466, 488-9 (6th Cir. 2008). Because the variance is granted automatically, it fails to require that water quality standards be met where attainable.

2. EPA could not approve Circular 12-B because the general variance does not protect the highest attainable condition.

Most egregiously, Circular 12-B is illegal because it does not require protection of the highest attainable condition or use, but instead allows pollution and damage to Montana water bodies that is completely avoidable. Under the Clean Water Act, water bodies are protected for different kinds of uses—fish, shellfish, wildlife, and public health. Different levels of pollution may interfere with one use and not others. For example, a hypothetical pollutant at a low concentration (*e.g.*, 25 µg/L) might make it impossible for a water body to support sensitive mussel species, while a higher level (*e.g.*, 75 µg/L) of the pollutant might be tolerable to support trout fishing and only a substantially higher concentration of the pollutant (*e.g.*, 125 µg/L) would harm use of the water body for purposes of swimming or boating.

As is proper, the Montana numeric nutrient criteria of Circular 12-A are designed to protect the "most sensitive use," which in most cases is the most sensitive aquatic life. AR 835, 33 U.S.C. §§ 1251(a)(2) and 1313; 40 C.F.R. § 131.11(a). These criteria, almost by definition, are more stringent than the criteria necessary to protect less sensitive uses, such as bass fishing. However, based on a conclusion that requiring treatment of wastewater to protect the most sensitive use "would have resulted in substantial and widespread economic impacts on a statewide basis," DEQ is allowing all dischargers a wholesale variance if they meet the weak end-of-the-pipe treatment requirements of Table 12-B-1. This is true even though the requirements of Table 12-B-1 have not been shown to protect any uses whatsoever.

DEQ, then, has taken the position with EPA's approval, that in cases where the most sensitive use cannot be protected, nothing need be protected. Or, to look again at the example of a hypothetical pollutant, DEQ and EPA take the position that if lowering the pollutant to 25 µg/L to protect sensitive mussels is not attainable, they will not even attempt to lower pollutants to 125 µg/L to at least protect swimming although the 125 µg/L level is attainable.

EPA's approval of DEQ's position that in cases where the most sensitive use cannot be protected, no designated use need be protected is contrary to long-standing EPA policy and guidance. EPA is quite familiar with problems associated with DEQ's general variance approach and has cautioned against it. In a federal register statement published in September 2013, EPA explained:

> [A]s part of the [Use Attainability Analysis][14] process, a state or tribe may be able to demonstrate that a use supporting a particular class of aquatic life is not attainable. However, if some less sensitive aquatic organisms are able to survive at the site under current or attainable future conditions, the goals of the CWA are not served by simply removing the aquatic life use designation and applicable criteria without determining whether there is some alternate 101(a)(2) use or subcategory of such a use that is feasible to attain.

78 Fed. Reg. 54,517, 54,523 (Sept. 4, 2013). And earlier, specifically with regard to variances, EPA made plain, in a document cited by EPA in its approval of the DEQ variance (AR 843, n. 34), that where designated uses are not attainable, interim standards, such as those of Table 12-B, must be based on the "highest attainable use" (not just what can be done without making what DEQ would consider substantial investments):

> What must a state or tribe keep in mind when determining the appropriate interim requirements for a multiple discharger variance?
>
> As with any water quality variance, the interim requirements will need to reflect the highest attainable condition during the term of the variance. The highest attainable condition may be expressed as the highest attainable interim use and criterion or highest attainable effluent condition for a permittee(s) during the term of the variance. For example, this could be accomplished by specifying in the variance a numeric value that reflects the highest water quality that a discharger could achieve … during the term of the variance.

[14] The procedures for granting variances at the time DEQ finalized its rules, were subject to the requirements used to assess use attainability analyses. 40 C.F.R. § 131.10(g).

See, EPA Frequently Asked Questions document, AR 593.

Finally, due to the language of the Clean Water Act and EPA's long-held position that variances can only be allowed to protect the highest attainable condition, EPA formally codified the concept that variances must be designed to protect highest attainable uses in regulations finalized less than seven months after the defective DEQ variance was approved at 40 C.F.R. §131.14.[15] These regulations merely incorporated the principles manifested in the Clean Water Act that had long been recognized by EPA. EPA's approval of Circular 12-B is plainly contrary to EPA's long-standing practice and interpretation of its variance rule and requirements under the Act.

3. The record contains no support for EPA's failure to protect the "highest attainable condition."

EPA openly acknowledged, in its approval document, that the DEQ general variance interim end-of-the-pipe limits are far weaker than what dischargers can achieve for nutrient pollutants, especially for phosphorus. AR 849. EPA's sole rationale for not requiring better treatment where possible, is an assertion that controlling phosphorus alone down to background levels (10 µg/L) would skew the nitrogen to phosphorus ratio ("N:P"), which might lead to a particularly bad form of algae, *didymosphenia geminata*, becoming more prevalent in Montana waters. *Id.* While this sounds like a rationale for disregarding the highest attainable use requirement, the record is devoid of support for it.

---

[15] These regulations were initially proposed and published September 4, 2013, a year before DEQ submitted its standards to EPA and more than 18 months before EPA approved Circular 12-B. 78 Fed. Reg. 54,517 (Sept. 4, 2013).

Initially, EPA doth protest too much with this argument, attacking a straw man. No one has argued that Montana control only phosphorus or that Montana attempt to control phosphorus to the level of 10 µg/L.[16] To the contrary, Waterkeeper advocates that *both* phosphorus and nitrogen be controlled, each to achieve highest attainable uses. It is the absence of any attempt to protect the highest attainable use at all for either pollutant that is the problem. The EPA approval document acknowledges that nitrogen levels could be lowered considerably below the levels required by the variance in Circular 12-B in stating that nitrogen can be reduce to 1300 µg/L, less than one-fifth of the 10,000 µg/L level required by 12-B, although not "reliably." *Id.*

The record document cited by EPA lends no support to EPA's claim that more advanced control of phosphorus could harm Montana waters. In its approval letter (AR 849, n.58), EPA cites to the executive summary of a document, Suplee, M.WI., and V. Watson2, 2013. Scientific and Technical Basis of the Numeric

---

[16] It is worthy of note that 10 ug/L is actually well below the lowest criteria for phosphorus, 25 ug/L, actually established for any ecoregion in the state. (Circular 12-A AR 1222.) In other words, EPA's boogey man is much more stringent than what would be required if the protective numeric standard for phosphorus were fully implemented.

Nutrient Criteria for Montana's Wadeable Streams and Rivers – Update1. Helena MT: MDEQ, regarding the potential problem of *didymosphenia geminata* and the danger posed by failing to maintain current N:P ratio. However, what the document actually says is:

> The nuisance diatom alga *didymosphenia geminata* has, in recent years, spread to and formed nuisance benthic blooms in low-nutrient rivers and streams worldwide. It is found in Montana and, in western U.S. states, probabilistic survey data show that in over half of streams contain *D. geminata* [total phosphorus] is <10 μg/L. Others report that *D. geminata* usually occurs in streams with very low P and that *it tends to disappear when TP exceeds about 20 μg/L*.

AR 9985 (emphasis added; internal citations omitted.) Given that *D. geminata* "tends to disappear" when total phosphorus levels exceed 20 μg/L, it is readily apparent that phosphorus levels could be reduced far below 1000 μg/L without posing any risk of causing the problem that EPA claims to fear will occur through zealous control of phosphorus. Indeed, it appears that achieving the Montana phosphorus criteria in the part of the state where phosphorus criteria are lowest (*i.e.*, 25 μg/L) would pose little risk of having the adverse effect that EPA uses as its justification for approving the replacement variance standard. Meanwhile, the replacement standard allows unnatural algal growth that could be avoided through imposition of attainable phosphorus permit limits. EPA's excuse for failing to impose the highest attainable condition is, in fact, contradicted by its own record documents.

Finally, many of the numeric criteria set forth in Circular 12-A and approved by EPA are for nitrogen and phosphorus criteria that deviate substantially from the 10:1 ratio implied by the effluent requirements set by Circular 12-B. Moreover, Circular 12-B explains that dischargers need not discharge at any particular N:P ratio to make use of the general variance, stating explicitly that dischargers may actually discharge at levels that vary from the 10:1 ratio. AR 1231.[17] Still further, dischargers can get an additional variance even from the Table 12-B requirements (a variance from the variance as it were) without regard to maintaining any particular N:P ratio. Individual variances may be granted on a case-by-case basis because attainment of the standards is "precluded due to economic impacts, limits of technology, or both." AR 1233. The only time the need to maintain N:P ratio is mentioned is when it is thought to justify weaker controls than are attainable. The record is clear that the 10:1 ratio requirements of Table 12-B was not designed to protect any ratio, but was rather designed to find a level of treatment that could easily be met.

EPA cannot justify its failure to abide by its own rules and policy for variances. EPA's approval of Circular 12-B must be reversed.

CONCLUSION

EPA's approval of the Circular 12-B technology performance standard for

[17] "[A] general variance is allowable if the permittee treats the discharge to, *at a minimum*, the concentrations" contained in Table 12-B-1 (emphasis in original).

nutrient pollutants in Montana is contrary to the direction of Congress in the Clean Water Act in that it is not a water quality standard designed to protect designated uses and to serve the purposes of the Clean Water Act. Moreover, Circular 12-B is wholly contrary to the record that supports science-based nutrient criteria. At a minimum, EPA's approval is arbitrary and capricious as it is contrary to EPA's own long-standing policy and rules on the development and use of variances to water quality standards. Waterkeeper respectfully requests that the Court reverse and vacate EPA's approval of Circular 12-B.

Respectfully submitted this 21st day of December, 2016.

/s/ Janette K. Brimmer
JANETTE K. BRIMMER (WSB #41271)
STEPHANIE K. TSOSIE (WSB #49840)
(*Pro Hac Vice Admission)*
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104-1711
(206) 343-7340 | Phone
(206) 343-1526 | Fax
jbrimmer@earthjustice.org
stsosie@earthjustice.org

*/s/ Albert Ettinger**
Per email authorization
ALBERT ETTINGER (IL ARDC#3125045)
(*Pro Hac Vice Admission)*
53 W. Jackson, #1664
Chicago, IL 60604
(773) 818-4825 | Phone
ettinger.albert@gmail.com
Attorneys for Plaintiff Upper Missouri Waterkeeper

*/s/ Katherine O'Brien**
Per email authorization
KATHERINE O'BRIEN (MSB #13587)
Earthjustice
313 East Main Street
Bozeman, MT 59715-6242
(406) 586-9699 | Phone
(406)586-9695 | Fax
kobrien@earthjustice.org
Local Counsel for Plaintiff Upper Missouri Waterkeeper

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2), I hereby certify that the foregoing brief contains 10,049 words, as determined by the word count function of Microsoft Word. The Court has granted leave to file a brief in excess of the Court's 6,500 word limit (ECF No. 64).

DATED this 21st day of December, 2016.

/s/Janette K. Brimmer
JANETTE K. BRIMMER

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2016, I electronically filed the foregoing *Memorandum In Support of Plaintiff's Motion for Summary Judgment* with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

DATED this 21st day of December, 2016.

/s/Janette K. Brimmer
JANETTE K. BRIMMER